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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MONTY DUAL EMBRY,

Defendant and Appellant.

F075468

(Super. Ct. No. BF160677A)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. John R. Brownlee, Judge.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Michael P. Farrell, Senior Assistant Attorney General, Eric L. Christoffersen and Christina Hitomi Simpson, Deputy Attorneys General, for Plaintiff and Respondent.

-ooOoo-

Monty Embry appeals his convictions and sentence in this case, which arose from the killing of Darrelle Rashad Robertson. In challenging his convictions, Embry raises claims of prosecutorial misconduct, ineffective assistance of counsel, and cumulative

error. We reject all of these contentions. As to his sentence, Embry argues the trial court abused its discretion in denying his *Romero*¹ motion. We disagree. Embry also argues the case must be remanded for resentencing in light of Senate Bill No. 620 (which gave trial courts new discretion to strike firearm enhancements) and Senate Bill No. 1393 (which gave trial courts new discretion to strike prior-serious-felony enhancements). We find merit in these contentions. Accordingly, his sentence is vacated and the matter remanded for resentencing. The judgment is affirmed in all other respects.

PROCEDURAL HISTORY

Embry was charged with premeditated murder (Darrelle Robertson); attempted murder (Jennifer Walters); assault with a firearm (Jennifer Walters); reckless discharge of a firearm; and misdemeanor carrying a concealed weapon in a vehicle. (Pen. Code, §§ 187, subd. (a), 664/187, subd. (a), 245, subd. (a)(2), 246.3, subd. (a), 25400, subd. (a)(1).)² Various firearm enhancements were attached to the charges of murder (§ 12022.53, subd. (d)), attempted murder (§§ 12022.5, subd. (a), 12022.53, subd. (c)), and assault with a firearm (§ 12022.5, subd. (a)). The information further alleged Embry had suffered a prior “serious felony” and “strike” conviction for battery in 1986 (§§ 667, subds. (a) and (c)-(j), 1170.12, subds. (a)-(e), 243, subd. (d)).

A jury convicted Embry of the second-degree murder of Darrelle Robertson and found true the attached gun enhancement. The jury acquitted Embry of the attempted murder of Jennifer Walters but convicted him of assault with a firearm with respect to Walters; the jury also found true the gun enhancement attached to the assault charge. Finally, the jury convicted Embry of reckless discharge of a firearm and misdemeanor carrying a concealed weapon in a vehicle. In a bifurcated proceeding, the court found

¹ *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

² Undesignated statutory references are to the Penal Code.

true the allegation Embry had suffered a prior serious felony and strike conviction for battery in 1986. (§§ 242/243.)

Embry was sentenced to an aggregate term of 83 years in prison. He was sentenced to 15 years to life for the second-degree murder conviction, doubled because of the prior battery strike conviction, plus five years for the prior battery serious felony conviction, along with 25 years for the associated gun enhancement, for a total of 60 years on this count. He was also sentenced to the upper term of four years for the assault-with-a-firearm conviction, doubled on account of the prior battery strike conviction, plus five years for the prior battery serious felony conviction, along with 10 years for the associated gun enhancement, for a total of 23 years on this count. On the reckless-discharge-of-a-firearm conviction, Embry was sentenced to the upper term of six years, which was stayed pursuant to section 654. Finally, Embry was sentenced to a concurrent term of one year on the misdemeanor conviction for carrying a concealed weapon in a vehicle.

FACTS

Prosecution Case

A. Killing of Darrelle Robertson

During the early morning hours of June 28, 2015, Darrelle Robertson was shot and killed in an alley behind his aunt Tanya Smith's house in Bakersfield. It was undisputed that Embry fired two shots in the alley in connection with a verbal and physical altercation with Robertson and that the bullet from one of those shots lodged in Robertson's back and killed him. The defense's trial theory was that Embry acted in self-defense.

The evening before the shooting, Robertson and his girlfriend, Jennifer Walters, were socializing at Smith's house. Smith's adult daughter, Mercedes, as well as Smith's 15-year-old granddaughter, Kiara, also participated in the festivities, among other people.

The adults had been drinking tequila all evening. Robertson was approximately 35 years old; he was 6'4" tall and weighed 275 pounds.

Smith's house was set back on its lot, close to a rear alley. The back door of the house opened onto a raised back porch with steps leading down to the yard alongside the alley. A chain link fence separated the yard from the alley; the alley was accessed through a gate in the chain link fence. Early that morning, at approximately 2:00 a.m. or 3:00 a.m., Embry came to see Smith, his friend of 20 years. He parked in the alley behind Smith's house, as he usually did when he visited her. Smith went outside to meet him and got into his green Chevrolet Suburban to hang out and talk with him.

Robertson did not like Embry as Embry had offended him in the past. At one point, Robertson went out into the alley to check on Smith and had words with Embry. Embry drove off, with Smith still in his car, evidently to avoid escalating matters with Robertson.

Robertson went back into the house and woke up Walters. Walters testified she and Robertson then got ready to return to their own house. After some time, Embry returned to drop Smith off. Smith came into the house to look for some fireworks for Embry and eventually went back outside and got back into Embry's Suburban.

At this point, Robertson went out to the alley again and resumed arguing with Embry. Walters testified she followed Robertson to see what was going on. Walters explained: "At this point, um, [Embry] and [Robertson] were having words, um, and I kind of assessed the situation out. I hadn't stepped completely off the [back] porch. And it just felt awkward that night, felt different than any other time that they argued. So I made some comments to [Robertson] that, " 'Hey, I think [Embry's] bucking,' " or " 'I think [Embry] may have something. His energy is kind of different tonight. He's bucking. Let's go. Let's go.' " By "bucking," Walters meant exhibiting "[r]eally aggressive, intimidating" behavior.

Kiara testified she also heard the argument in the alley; specifically, she heard Robertson, Walters, Smith, and Embry yelling and screaming. Smith's voice was the loudest; she was sitting in the passenger seat of Embry's Suburban and "was telling [Robertson] to go back into the house." Robertson was leaning into the driver's window of Embry's car and "calling him names." Robertson wanted to fight Embry but Embry was telling Robertson "no" and pointing to his "hurt arm" (Embry had recently had rotator-cuff surgery). Kiara decided to record events on her cell phone; the recording she made was about "eight to ten minutes" long. The recording was played for the jury.

In Kiara's cellphone video, Robertson can be heard challenging Embry to a fight. Embry, for his part, said things like, "Please don't, [Robertson], please" and "I'm asking you man." At one point, Robertson said: "I'll put one arm behind my back." Smith told him to "Stop." Embry said: "Don't do that man, don't do that man, please." Walters can be heard saying, evidently to Embry: "I see you look like you going under your shirt. You bucking out." At another point, Embry said to Robertson: "I wish my shoulder wasn't fucked up ... I'd fuck you up."

Walters testified that after this interaction in the alley, she and Robertson went back into the house and got ready to leave. They got into their Cadillac Escalade. Robertson wanted to go back to the alley at that point. Walters told him she was concerned Embry had some kind of weapon. Robertson replied, "Jennifer, I know you're ready to go home, but I have to check on my aunt one more time." So Walters, who was driving, drove around the block and into the alley and pulled up behind Embry's Suburban. Robertson walked up to Embry's driver-side window and started talking to Embry, while Walters waited in the car. Walters saw strenuous arm movements made by both Robertson and Embry. She could not clearly discern what was going on but did see Robertson reach into Embry's window and shove him.

Sensing she urgently needed to "relieve the situation," Walters got out of the Escalade, went up to Robertson, grabbed him, and said, "Let's go." Walters testified:

“When I walked up to the vehicle, my biggest concern was to get [Robertson] away from the situation and to walk to the car.” Finally, Robertson turned and began walking towards the Escalade while Smith, who had been sitting in the passenger seat of Embry’s Suburban, got out and walked towards the house. Walters testified that as she was turning to follow Robertson, she saw Embry outside his Suburban raising up the barrel of a gun (Walters subsequently indicated that she possibly first saw Embry raise the gun while he was still sitting in his Suburban and then again outside it).

Walters continued: “And at that point I heard two shots. My back was turned. Um, um, I don’t know where the two shots went, but I know that at least one hit [Robertson] in the back] ... [¶] ... [because] he immediately collapsed.” The two shots occurred in close succession. Walters confirmed she did not see the shots being fired. Walters rushed over to Robertson, who had collapsed on his stomach; she saw a gunshot wound in his “right upper back.” Robertson was walking away from Embry’s Suburban and toward the Escalade, when he was shot. Walters testified Robertson did not own a firearm.

Smith also heard the shots. She did not see the shots being fired because her back was turned at the time, as she was walking back into her yard thinking the argument was over. Smith did not know where Robertson and Walters were at the time, as she was on the other side of the Suburban (i.e., the passenger side) and it was dark. After the shots were fired, Smith turned and saw Embry standing outside the Suburban; his arm was outstretched and he held a gun. Kiara, who was in the kitchen at the time, also heard the shots, but did not see the shooting occur.

After the shooting, Embry sped away. Emergency personnel responded to the scene and transported Robertson to a hospital. Robertson died of his injuries.

B. Police Investigation

Embry was arrested in San Jose the next day, coming out of a casino. He told police he had contacted an attorney and intended to turn himself in the following day. A

holstered Smith and Wesson revolver with four live rounds was found in the Suburban. There was a bullet hole in the front windshield on the passenger side. Some fireworks were found in the cargo area.

During the autopsy on Robertson's body, a bullet-entrance wound was identified on the "upper left back" and a bullet was recovered from under the skin. Robertson's blood alcohol concentration was determined to have been 0.263 at the time of his death.

Christopher Snow, a criminalist with the Kern Regional Crime Lab, analyzed the revolver found in Embry's Suburban and the bullet extracted from Robertson's body. Snow opined Embry's revolver had been used to fire the bullet. Snow also testified that the revolver had a single-action trigger pull of three and a half pounds and a double-action trigger pull of nine pounds. The revolver had a safety mechanism to prevent accidental discharge, whereby the trigger would have to be pulled to fire the revolver.

Defense Case

A. Embry's Testimony

When the shooting occurred, Embry was 60 years old and weighed 180 pounds. He testified that, on the night of the shooting, he was sitting in his Suburban with Smith in the alley behind her house. Robertson came out to the alley and belligerently argued with him. At one point, Embry drove away because he was concerned about Robertson's conduct. He reluctantly returned to drop Smith off at her house. Smith assured him Robertson would have left by then.

However, while Embry was parked in the alley waiting for Smith to bring out his fireworks, Robertson reappeared in the alley; Walters was with him. Embry repeatedly told Robertson to leave things be, entreating him, "I'm asking you man." Smith, who came and sat in the passenger seat of Embry's Suburban, similarly tried to persuade Robertson to listen to Embry. However, the exchange between Robertson and Embry got heated and Robertson suddenly swung at Embry, catching him by surprise. Robertson's swing hit Embry in the jaw. Robertson told Embry to get out of the car. However,

Embry's right arm was debilitated because of recent rotator-cuff surgery and he refused to leave the car. Instead, Embry tried to put his keys in the ignition, whereupon Robertson swung again and, in reaching up to protect himself, Embry dropped his keys. Embry then said to Robertson, "Please don't, [Robertson], please."

Robertson swung at Embry four or five times while Embry was seated in the car, and pulled Embry's door open. Embry testified: "[F]or him to get in there with me with my shoulder in the condition that it is, I didn't want that. That was scary." Robertson also made a remark about God that Embry found unsettling. Once Robertson opened the door and stepped around it, Embry had no option but to get out of the car.

Embry had a gun at his waist, and when Robertson took a step forward, Embry "raised the gun up." Embry had no other way to defend himself, in light of the condition of his arm. Embry explained: "I just wanted him to stay off of me. I didn't know whether – what he was going to do to me. I was in fear for my life. I just – I didn't know. I didn't know." Embry added: "When I lifted the gun, I could feel it. I can feel it in here and I flinched and I brought it around and I flinched again. And I flinched and it went off." Embry further clarified what happened: "I did not intentionally pull the trigger. The gun went off because I squeezed it because my arm jarred." Embry said he "was frightened to death." He noted he no more intended to shoot Robertson than he intended to fire a shot through his car's front window, on the passenger side (which is where the first shot went). When the first shot discharged, Robertson was facing Embry, not walking away. Embry said: "If he had walked away, I would have left, too." After the first shot, Robertson started to turn away; that was when the gun went off the second time.

When Embry saw the gun flash, he immediately dropped it. At that point, he saw Walters in his "peripheral vision." Embry testified: "[Walters] looked down at the gun and she looked back up at me and then took off running to [Robertson] and started hollering."

Embry had received the gun from a friend named Terry, as collateral for a third-party loan. Embry had not removed it from the holster prior to the night of the shooting and did not know it was loaded until after the shooting. Embry knew Robertson's father and was his friend; Embry did not intend to hurt Robertson.

On cross-examination, the prosecutor asked Embry whether he "lost it" when Robertson started swinging at him, on top of all the yelling and cursing. Embry answered: "[N]o, I didn't lose it. Then I became concerned. I kept – I began to have fear because I didn't have my keys. I couldn't get away. He's exceptionally bigger than I am. No, I was scared. I didn't know – and I couldn't use my arm. I wasn't – how am I going to lose it? And I can't – nothing I can do about it. I was scared." The prosecutor also gave Embry an opportunity to explain a statement regarding the shooting he made in a jail call to his sister, to the effect that he must have gone insane for a minute. Embry responded that the statement was not intended literally and was not serious.

On redirect, Embry again explained that he was scared: "Well, when [Robertson] opened the door, he was already working himself around to come in at me. And so, therefore, he was getting ready to attack me ... [¶] ... I pulled out the gun for one purpose, and that purpose was to show him the gun and hope that he would stop his assault and that I could get in the car and leave. That's all I wanted to do." When Embry took the gun out of the holster, he "never pulled the hammer back." Embry did not intend to shoot Robertson.

After the shooting, Embry had to "go down on the floorboard" to find his car keys; he was able to do so as the door was open and the interior light was on. At that point he left.

B. Other Evidence

Embry's friend Espinola Parker testified she was on the phone with Embry when he was sitting in his Suburban outside Smith's house. She heard a "commotion" in the background and heard Embry say, "Come on, man. Why are you hitting me? Why are

you hitting me like this? Man, you don't have to hit me.” She tried to record the conversation but the call got cut off.

A physical therapist who had treated Embry testified Embry had rotator cuff surgery on April 8, 2015 and had not regained full use of his arm at the time of the shooting.

Attorney Seth O'Dell, who had represented Embry in some prior misdemeanor matters, testified that he was contacted by Embry on an urgent basis for purposes of arranging his surrender to the authorities. O'Dell then intervened with the police and arranged for Embry to surrender early the following morning. However, the police were able to track Embry down and arrest him the day he talked with O'Dell, before he could surrender in accordance with the predetermined plan.

DISCUSSION

I. PROSECUTORIAL MISCONDUCT

Embry raises multiple claims of prosecutorial misconduct we will address in sequence below. We conclude there was no misconduct or that any arguable misconduct was not prejudicial. Accordingly, we reject all of Embry's claims in this regard.

Defense counsel did not preserve these claims for review by making appropriate objections below. Embry therefore raises an alternative claim of ineffective assistance of counsel premised on counsel's failure to object to the alleged instances of prosecutorial misconduct. However, since we have addressed the prosecutorial misconduct claims on the merits and rejected them, Embry's alternative ineffective assistance of counsel claims also fail.

A. Applicable Law

Prosecutorial misconduct occurs when a prosecutor uses deceptive or reprehensible methods in attempting to persuade either the trial court or the jury. (*People v. Riggs* (2008) 44 Cal.4th 248, 298.) “To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable

likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we ‘do not lightly infer’ that the jury drew the most damaging rather than the least damaging meaning from the prosecutor’s statements.” (*People v. Frye* (1998) 18 Cal.4th 894, 970 (*Frye*), disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22 (*Doolin*).) Finally, “[a] defendant’s conviction will not be reversed for prosecutorial misconduct ... unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.” (*People v. Crew* (2003) 31 Cal.4th 822, 839.)

Prosecutorial misconduct can violate the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with a level of unfairness that renders the resulting conviction a denial of due process. (*People v. Hill* (1998) 17 Cal.4th 800, 819 (*Hill*).)

B. Prosecutor’s Discussion of “Reasonable Person” Standard

Embry contends the prosecutor committed misconduct in closing argument, by making misleading comments about a “global reasonable man standard.” We reject this contention.

In his initial closing argument, the prosecutor referred to the reasonable person standard only twice. First, the prosecutor referred to the reasonable person standard at the very beginning of his argument, in connection with laying out the definitions and elements of the crimes at issue, including first- and second-degree murder (count 1), attempted murder (count 2), and assault with a firearm (count 3). Specifically, the prosecutor highlighted the term “reasonable person” in discussing the jury instruction for assault with a firearm. The prosecutor noted that the term appears in other jury instructions as well, such as the one for self-defense.

The prosecutor then observed that self-defense was relevant to several of the charges at issue but added that “the defendant did not act in self-defense.” The

prosecutor continued: “So what is a reasonable person? Because you’re going to see it throughout the jury instruction[s]. A reasonable person is a normal person. So you don’t get to come up with your own standard of conduct. You don’t just kind of get to make things up. A reasonable person is a normal, everyday person on the street with just normal ability – mental ability, normal physical ability, a person who is prudent, a person who is careful.” The prosecutor added, “And so those words, a person that is prudent and careful, what is that? It is a person who is sensible, it’s a person who is thoughtful, it’s a person who’s conscientious. That’s a reasonable person in the community. It’s not you just get to get up there and make up whatever you want to say. This is an everyday, ordinary, prudent person in the community. That’s what a reasonable person is.”

The prosecutor thus focused his comments on the term “reasonable person” as it appears in the instructions on assault with a firearm (as well as, by extension, simple assault, a lesser included offense) and self-defense. (See CALCRIM Nos. 875, 915, 3470) We detect no impropriety in the prosecutor’s explanation of this term in this context.

Next, the prosecutor turned to the definition of the crime of reckless or grossly negligent discharge of a firearm (count 4). In this connection, the prosecutor observed: “Has to be intentional discharge of a firearm, has to be done with gross negligence. It could have resulted in injury or death of a person. And, again, the defendant did not act in self-defense.” The prosecutor continued, with reference to the elements of this offense: “What is gross negligence? You act in a reckless way, a high degree of risk. A reasonable person, a sensible person, a conscientious person, a thoughtful person, a normal person would have known that acting in such a way would create such a risk.” The prosecutor added: “You see this slide quite a bit. What is a reasonable person? It’s a normal person in the community.”

Here, the prosecutor was explaining the meaning of the term “reasonable person” as it appears in the jury instructions on grossly negligent discharge of a firearm and self-

defense. (See CALCRIM Nos. 970, 3470) We detect no impropriety in the prosecutor's explanation of this term in this context.

After defense counsel had presented her closing argument, the prosecutor referenced the reasonable person standard again, in his rebuttal to defense counsel's argument. Defense counsel had argued Embry acted in self-defense. She noted: "*Mr. Embry told you he didn't intend to kill [Robertson] or even shoot him. He took the gun out to stop him from coming towards him. He was acting in self-defense. I'm not going to really spend a lot of time with [manslaughter], because that talks to imperfect self-defense [and] when there's just the heat of passion.*³ *But that's not the case here. Mr. Embry was acting in self-defense. He was lawfully defending himself.*" (Italics added.) Defense counsel concluded her argument as follows: "I'm not saying Mr. Embry is perfect. I'm not saying he did everything the way he should have. But what I am telling you is he was acting in self-defense. *And self-defense is a complete defense to Counts 1, 2, 3, and 4.*" (Italics added.)

In response to defense counsel's argument, the prosecutor argued: "And when it comes to bias, who's the most biased party in this case? It's Mr. Embry. He is the most biased witness in this case. *Again, reasonable person.* You don't get to create your own standard of conduct. That's what Mr. Embry has tried to do in this case. He wants to create his own standard of conduct ... [¶] ... You don't get to create your own standard of conduct. And that's what he's done ... [¶] ... How do you even get there? [¶] Self-defense equals a justifiable homicide. Justified. It's what you have to say. That he is justified in what he did."

³ The Reporter's Transcript depicts this sentence as follows: "I'm not going to really spend a lot of time with *involuntary manslaughter*, because that talks to imperfect self-defense [and] when there's just the heat of passion." (Italics added.) However, given counsel's references to imperfect self-defense and heat of passion, it is clear counsel was referring to *voluntary manslaughter*. Thus, it appears counsel either misspoke or the court reporter misheard "involuntary manslaughter."

Here again, the prosecutor properly referenced the “reasonable person” standard in relation to self-defense. Indeed, he went on to methodically address the elements of self-defense and to further emphasize that self-defense did not fit the facts of the case, because a “normal,” “sensible” person would not have reacted as Embry did, under the circumstances. The prosecutor concluded: “None of this is what a reasonable person would do. It’s not self-defense because what [Embry] did is not reasonable.” Again, we detect no impropriety in the prosecutor’s argument in the context of self-defense.

Embry argues, “[t]he problem with the prosecutor’s argument is that he conflated the reasonable man standard to such a degree and straight across the board for every aspect of the law to which it might apply: provocation which reduces first to second degree murder, voluntary manslaughter heat of passion/imperfect self-defense, and gross negligence.” We are not persuaded. The prosecutor referred to the reasonable person standard in the context of discussing specific crimes (assault with a firearm and grossly negligent discharge of a firearm) and defenses (self-defense), the jury instructions for which crimes and defenses contain the term “reasonable person.” As noted above, there was nothing improper about the prosecutor’s references to the reasonable person standard in the context of assault with a firearm, grossly negligent discharge of a firearm, and self-defense. We disagree with Embry’s suggestion that the prosecutor misrepresented the standard because he did not explain, as to grossly negligent discharge of a firearm and self-defense, that the standard refers to a reasonable person in the defendant’s circumstances. The latter point was implicit in the prosecutor’s argument and, in any event, the relevant jury instructions make it clear.

Contrary to Embry’s contention, because the prosecutor’s references to the reasonable person standard were made in the context of *specific* crimes and defenses, they would not reasonably have confused the jury as to the elements of *other*, unrelated

crimes and defenses, such as voluntary manslaughter and subjective provocation.⁴ Indeed, the prosecutor was, for the most part, explaining what the term “reasonable person” itself means, and the jury instructions for voluntary manslaughter and subjective provocation do not even contain the term “reasonable person.” (See CALCRIM Nos. 522, 570, 571.)

C. Prosecutor’s Reference to a Prior Fight Involving Embry

The prosecution introduced evidence of a recorded jail call between Embry and his sister. In the call, Embry bragged about an earlier, unrelated incident in which he was drunk and provoked a fight with a younger and bigger man. Embry explained that after he and the other man argued over something, Embry took a swing at him and tagged him. Embry said he lost that fight and got beat up by the other man. During his trial testimony, Embry insisted he had exaggerated the details of the incident in the call with his sister.

Defense counsel, in her closing argument, distinguished that incident from the present case. Counsel noted: “Mr. Embry told you that was a very different situation. Because in those years past, he didn’t have his shoulder surgery and the person he was dealing with was 20 or 30 pounds heavier than him, [rather] than nearly a hundred [as was the case here]. And it was a five-year age difference [rather than] a 25-year age difference.”

The prosecutor, in his closing argument, also mentioned the earlier incident described by Embry in the jail call. The prosecutor stated: “You heard Mr. Embry’s fight that he provoked on his jail call. Do you think that Mr. Embry, when he punched that guy, that guy’s allowed to shoot him? No. A punch is a punch. A deadly weapon is a deadly weapon. How do you get there? You don’t. You don’t get to escalate to that

⁴ Embry’s citations to cases about voluntary manslaughter (e.g., *People v. Najera* (2006) 138 Cal.App.4th 212) are, therefore, inapposite.

level of force. It says it in the jury instruction. No more force than is reasonably necessary.”

Embry makes a highly convoluted argument to the effect the prosecutor’s remarks in connection with this incident were improper. However, the prosecutor simply discussed the incident to illustrate how the self-defense doctrine works. We are not persuaded that the prosecutor’s comments were improper or that the jury likely misconstrued them. In addition, Embry has not shown he was prejudiced by these comments.

D. Prosecutor’s Use of Demonstrative Aids in Closing Argument

The prosecutor, in his closing argument, showed the jury bags of rice—one five-pound bag of rice plus two two-pound bags of rice—to demonstrate for the jury, by means of a visual analogy, the weight or force required to pull the trigger of the gun used to kill Robertson. Embry argues the prosecutor’s use of the bags of rice as a demonstrative aid for this purpose was improper. We reject this contention.

(1) Background

Snow testified as a ballistics and firearms expert for the People. He examined and tested the revolver used to kill Robertson. He described the revolver’s characteristics:

“[T]his revolver can be fired in either a single-action or a double-action mode. And what that means is that you can take this revolver and you can just pull the trigger, and as you pull that trigger, it will pull the hammer back, and then release the hammer down. Or you can take that hammer and you can cock the hammer back with your thumb and then pull the trigger. And so I measured both of those trigger weights. So one is in single-action mode, the other one is in double-action mode.

“And I do that with a – I have a rod that has kind of an L on it, and I can hang different weights on that rod. So I’ll – for example, I’ll cock the hammer, rest a weight on to that trigger. And if it doesn’t go off, I’ll rest another weight and another weight. And I keep going until finally the trigger releases. And that’s the number that gets recorded as my trigger pull.

“So for this particular firearm I had a single-action trigger pull of about three and a half pounds and I had a double-action trigger pull of nine pounds. So that’s how much force it takes to get the trigger to release – or get the hammer to release.”

Snow explained that a single-action trigger pull of three and a half pounds was “fairly average” and described it as a “good trigger pull.” Snow answered in the negative when asked whether it would be considered an “extremely light trigger pull.”

The prosecutor asked Snow, “Why is one three and a half and why is one nine?” Snow explained:

“The nine is because you’re pulling against the spring to cock that hammer back. So it takes more force to cock the hammer back as you’re pulling the trigger than if you were to cock the hammer back and then pull the trigger. If you cock the hammer back and then pull the trigger, it takes much less force to get that hammer to release.

So ... if you wanted to fire this gun, for example, and really concentrate on your target at a distance, it would be – it would behoove you to pull that hammer back, because then you can get a nice steady trigger release on that and not have too much force. Or if you’re in an emergency situation, you need to use the gun right away, you can pull it out of your holster, you know, and just pull the trigger and it will go off.”

The prosecutor also asked, “Now, can you describe what happens to that revolver if you fire rounds in succession? Or how do you go about that?” Snow responded: “You could fire rounds in succession with this gun just by pulling the trigger. And each time you pull the trigger, the cylinder rotates and lines up the next round as it goes around until the cylinder is empty.”

In the prosecution’s rebuttal case, Snow noted the revolver at issue was a .38 Special. He again explained that the gun had a single-action trigger pull of three and a half pounds and a double-action trigger pull of nine pounds. He reiterated that in single-action mode, an operator pulls the hammer back manually and then pulls the trigger to get the gun to discharge. On the other hand, in double-action mode, the operator pulls on the trigger alone to get the gun to discharge. Snow repeated that, in the

latter mode, “it takes nine pounds in order to pull that trigger all the way through, to pull that hammer back and release the hammer and discharge the firearm.” The prosecutor then questioned Snow, for the second time, about the process by which Snow had made this determination and Snow once again described it in detail.

Snow also noted the revolver had a safety mechanism and explained how this mechanism worked. In this regard, the prosecutor and Snow had the following exchange:

“Q. Now, as it relates to a revolver, do they have like a safety on them?

“A. Yes. This particular firearm has what’s called a rebound hammer safety. And what that is is if – if this firearm, say, for example, were to fall and it was loaded, and it happened to land on the back of the hammer, without this type of safety, this gun could go off. So the manufacturers put a safety in it called a rebound hammer safety so that if that – if you don’t have any pressure on that trigger, that hammer is going to be back slightly and locked into place. So that if the gun does fall and land on the back of that hammer, it’s not going to accidentally discharge.

So in order to get that gun to fire, you have to actually pull the trigger. And that will allow that hammer to go – to move all the way into the forward position to strike the firing pin.

“Q. So for this firearm there’s safety mechanisms in place so that the only way it can be fired is through the pulling of that trigger?

“A. Yes.”

During his closing argument, the prosecutor showed the jury a five-pound bag of rice and two two-pound bags of rice, to demonstrate, by analogy, the weight Snow had found was required to discharge the gun in its double-action mode (i.e., when the hammer was not manually cocked). Specifically, the prosecutor stated:

“Let me talk about the firearm. I have it in court with me today. I’ll put some gloves on. A .38 Special.

“According to Mr. Embry’s testimony, he did not pull the hammer back.

“It will be here for your perusal if you want to see it. Feel free to ask in a jury note.

“If you pull the hammer back, you’ll see the trigger moves. Set it in place. And you fire. That’s three pounds of force. Okay?

“That’s not what Mr. Embry did. That’s not what he did. He didn’t pull the hammer back. Three pounds of force, that means you use less force to fire. No. He pulled the trigger.

“What does it have to do? It has to turn the wheel. It has to pull the hammer back.

“Two times. That’s what he did.

“This is not something that can be done accidentally. It is nine pounds of force.

“What does nine pounds of force mean?

“I went shopping this weekend to help show what nine pounds for force is.

“Five pounds, right. Two pounds. Two pounds. That’s how much force it took. Nine pounds. That’s to discharge the firearm while pulling the trigger. It’s not going to. See how much force is necessary. Nine pounds of force.

“To sit up there and say it accidentally went off two times is beyond ludicrous. I don’t even think there’s a word in the dictionary that helps describe how ridiculous of a comment that is to say that gun with nine pounds of force went off twice accidentally. It did not.

“To fire a gun is something – especially in the means by which Mr. Embry did, is something that is done volitional[ly], purposefully. Accidentally is not the word that applies to that. And on top of that, two shots. Two shots.”

(2) Analysis

Embry argues the prosecutor’s use of the bags of rice in his closing argument was improper. We disagree.

Snow testified he had hung weights from the trigger of the revolver used in the crime, so as to ascertain the amount of force needed to discharge it in both the single-

action and double-action modes, respectively. Snow testified that three-and-a-half-pound weights were required to discharge the gun in the single-action mode and nine-pound weights to discharge the gun in the double-action mode. Embry testified he did not manually cock the gun's hammer before it discharged, indicating the gun was fired in the double-action mode. The prosecutor correctly argued that nine pounds of force would have been required to fire the gun in these circumstances. The prosecutor used bags of rice to represent the weights Snow used in testing the gun, so as to visually illustrate, by analogy to common items, the force required to fire the gun. The prosecutor's comments made patently clear that the bags of rice were simply intended as demonstrative aides to represent the weights Snow had used to the gun, nothing more. In light of Snow's detailed testimony, and the fact that the bags of rice represented the precise weight that Snow explained was hung from the revolver to discharge it in the double-action mode, we detect no impropriety in the prosecutor's actions, nor, even assuming impropriety, any prejudice to Embry.⁵ (See *People v. Barnett* (1998) 17 Cal.4th 1044 [upholding use of demonstrative aides in argument where aides were "useful for illustrative purposes," did not create a "misleading impression," and did not evoke an emotional bias "against the defendant as an individual"].)

E. The Prosecutor's Use of Emotive Language in Closing Argument

During closing and rebuttal arguments, the prosecutor made repeated references to Robertson as the father of four children. For example, the prosecutor stated, with reference to the defense theory of self-defense: "[E]ven if you take what Mr. Embry said as true, there's still no right to self-defense for one punch. To end a man's life, *a father*

⁵ During his closing argument, the prosecutor had on hand both the revolver that was used to kill Robertson (the revolver was in evidence) as well as the aforementioned bags of rice. Embry's statement, in his reply brief, that the prosecutor used, for demonstrative purposes, a gun that was "[not] remotely similar" to the gun used by Embry is contradicted by the record.

of four children over a singular punch is ridiculous.” (Italics added.) The prosecutor subsequently asked, for rhetorical emphasis, “Even if you take Mr. Embry’s word, [that] allows you to kill *a father of four*?” (Italics added.) At another point the prosecutor observed: “What this case is not is justifiable homicide. Let me keep saying that term. That’s what it means. That’s what ... self-defense is. You’re saying that Mr. Embry was justified in pulling out that gun and *putting a bullet into the back of a father of four* who was walking away.” (Italics added.) The prosecutor added: “On June 28th, 2015, [Robertson] was going home. [Robertson], *the father of four children, four children, earlier that day he had taken out his daughter to ice cream.* He was going home.” Similarly, the prosecutor also argued, “[Mr. Robertson] was shot. That ended his life. *Father of four.* And, again, even if you take what Mr. Embry says [as] true, *is that what the community becomes?*” (Italics added.)

Embry argues the prosecutor’s repeated use of the term, “father of four,” was improper as the prosecutor deployed it to arouse the jury’s emotions and sympathy. Embry further argues it was improper for the prosecutor to raise the issue of community values by arguing, “And, again, even if you take what Mr. Embry says [as] true, *is that what the community becomes?*” (Italics added.) Embry argues the prosecutor’s use of the above-mentioned words and arguments constituted misconduct.

Here the prosecutor’s statements are arguably inappropriate and inflammatory. (See *People v. Stansbury* (1993) 4 Cal.4th 1017, 1057, overruled on other grounds by *Stansbury v. California* (1994) 511 U.S. 318 [“an appeal for sympathy for the victim is out of place during an objective determination of guilt”]; *People v. Fields* (1983) 35 Cal.3d 329, 362 [“It has long been settled that appeals to the sympathy or passions of the jury are inappropriate at the guilt phase of a criminal trial”]; *People v. Gonzales* (2011) 51 Cal.4th 894, 952 [“purely emotional appeals” amount to “irrelevant information or inflammatory rhetoric,” which “diverts the jury’s attention from its proper role”]; *United States v. Monaghan* (D.C. Cir. 1984) 741 F.2d 1434, 1441 [“[a] prosecutor

may not urge jurors to convict a criminal defendant in order to protect community values” as that would create a danger “that the defendant will be convicted for reasons wholly irrelevant to his own guilt or innocence”].) However, in this instance, it does not appear reasonably likely the jury improperly construed or applied the prosecutor’s comments. Nor can we say Embry would have obtained a more favorable result absent these comments. Therefore, even assuming the comments were improper, they do not amount to reversible misconduct.

We further reject Embry’s claim that multiple instances of misconduct were cumulatively prejudicial.

II. INEFFECTIVE ASSISTANCE OF COUNSEL

In her closing argument, defense counsel noted that accidental homicide in the heat of passion is a category of excusable homicide. However, the defense of accidental homicide in the heat of passion does not apply when a dangerous weapon was used to commit the homicide. (§ 195, subd. 2.) Therefore, following counsel’s argument, the court instructed the jury that “[a]n excusable homicide, an accident in the heat of passion,” did not apply to the instant matter because the defendant had used a dangerous weapon, i.e., a gun.

Embry argues defense counsel “was ineffective [in] relying on an improper defense and failing to request further closing argument” after the court instructed the jury, following counsel’s closing argument, that the defense in question was inapplicable under the circumstances. We reject Embry’s contention.

A. Applicable Law

To establish constitutionally inadequate representation, a defendant must show that (1) counsel’s representation was deficient, i.e., it fell below an objective standard of reasonableness under prevailing professional norms; and (2) counsel’s representation subjected the defendant to prejudice, i.e., there is a reasonable probability that, but for counsel’s failings, the result would have been more favorable to the defendant.

(*People v. Haskett* (1990) 52 Cal.3d 210, 248; *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218; also see *Strickland v. Washington* (1984) 466 U.S. 668, 687-696.) “If the defendant makes an insufficient showing on either one of these components, the ineffective assistance claim fails.” (*People v. Rodriguez* (1994) 8 Cal.4th 1060, 1126.)

When reviewing an ineffective assistance of counsel claim, “there is a presumption counsel acted within the wide range of reasonable professional assistance.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009.) Finally, an appellate court may entertain a claim of ineffective assistance of counsel on direct appeal only when “ ‘there simply could be no satisfactory explanation’ ” for counsel’s conduct. (*People v. Wilson* (1992) 3 Cal.4th 926, 936.)

B. Background

Here, the defense’s theory of the case was that Embry shot Robertson in self-defense. Early in her closing argument, defense counsel clarified that the defense position was that the homicide was justified because Embry had acted in self-defense. Specifically, counsel argued:

“This wasn’t a situation where Mr. Embry went to [Smith’s house] looking for [Robertson]. He was acting in self-defense. There was no premeditation. There was no deliberation. And there was no malice. Self-defense is a justification, a – a legal justification to both first and second-degree murder. It is a legal justification. So someone acting in self-defense – legal self defense cannot be found guilty of murder. It’s also a legal justification to both voluntary and involuntary manslaughter, as well as attempted murder, attempted manslaughter, assault with a deadly weapon, and assault, and the reckless discharge of a firearm. Self-defense is a defense to Counts 1 through 4. And if you find Mr. Embry, which he was on June 28th, 2015, acted in self-defense, then you must vote not guilty.

“You remember during the jury selection I asked you would you hold [the prosecutor] to each and every element on each count. *One of the issues is he has to prove beyond a reasonable doubt that Mr. Embry wasn’t acting in self-defense. Which he has not. And you cannot because, in fact, he was [acting in self-defense].*” (Italics added.)

Defense counsel next sketched out the law of homicide for the jury. Counsel explained:

“Homicide is the killing of one being by another, one human being by another. There are homicides that are lawful and there are homicides that are unlawful. If a person kills with a legally valid excuse or justification, the killing is ... lawful and there has not been a crime committed. If there is no legal valid excuse or justification for the killing, then it’s unlawful and you have to look at the circumstances to determine whether it would be murder or manslaughter. So again, lawful homicide means justified or excused, which means self-defense or accident in the heat of passion. It’s not a crime. Unlawful or not justified or [not] excused. That’s how you get to manslaughter or murder.”

Thereafter, counsel laid out the facts relevant to the case and argued Embry had acted in self-defense, a legal justification. She again explained: “Mr. Embry would not be guilty of murder, manslaughter, attempted murder, or reckless discharge of a firearm while acting in self-defense. If he was reasonably acting in self-defense, that negates [everything]. It’s a legal justification.” Counsel added:

“In addition to self-defense being a justification or a fact that makes a homicide lawful, there is accident in the heat of passion. If there is a sudden quarrel and there’s an accidental death during that quarrel, that is – would result in a lawful killing. *I’m not going to spend a lot of time with this ... Mr. Embry told you he didn’t intend to kill [Robertson] or even shoot him. He took the gun out to stop him from coming towards him. He was acting in self-defense. [¶] I’m not going to really spend a lot of time with ... manslaughter [either], because that talks to imperfect self-defense [and] when there’s just the heat of passion. But that’s not the case here. Mr. Embry was acting in self-defense. He was lawfully defending himself.*

[¶] ... [¶]

“The gun. Mr. Embry told you that when he saw the gun it was initially in [its] holster ... And then he didn’t see it again until June 28th of 2015. [¶][¶] The fact that he saw the gun prior to June 28th of 2015 for a matter of he said less than a minute, would not mean that he saw the bullets. And he told you on June 28th of 2015 he wasn’t even sure whether or not it was loaded. He didn’t know. He didn’t inquire. It’s not something he considered when he [received the gun as collateral for a loan].

[¶] ... [¶]

“I’ve talked to you about lawful or excused. I’ve talked to you about self-defense and accidents in the heat of passion. Both make it lawful. Which means not guilty. Every person has the right to defend themselves. The jury instruction that you receive shows there’s no requirement that you retreat. Mr. Embry told you that he believed he was in imminent danger of great bodily injury. He talked about his shoulder. He talked about the size difference. He talked about the age difference. *He didn’t continue to fire the gun. He told you after the second shot and he saw [Robertson] go down, [he] put the gun by his side immediately after the gun fired, he got in the car and left. Never pointing at Miss Walters, Miss Smith, or anyone else. He got in the car and left. He used no more force than was necessary. He was lawfully defending himself.*

[¶] ... [¶]

“This case may not be what you think of when you think you’re going to be on a murder trial, who did it. This isn’t a who-did-it case. Mr. Embry was an individual holding a gun that was fired, that hit [Robertson] and ultimately resulted in his death. That’s not the question here. [But you must] hold [the prosecutor] to his burden beyond a reasonable doubt as to each and every element.

[¶] ... [¶]

“[Mr. Embry did] not want to engage in a fight with [Robertson]. But [Robertson] insists and he opens the [car] door. And Mr. Embry tells you the fact that he talked to him about God in your head, along with the fact of his shoulder injury, *he was in fear, imminent fear*. He’s there. He can’t get away. He has nowhere to go. He can’t leave. His keys are on the floorboard of his car that he can’t locate. [Robertson’s] aunt has asked him to stop. That didn’t stop him. Miss Walters said she told him it’s not worth it. That didn’t stop him. He’s .263 alcohol level. The coroner told you that that person was intoxicated.

[¶] ... [¶]

“This is a sad case. Someone has lost their life. *But Mr. Embry was acting in self-defense*. I haven’t addressed Count 5 [carrying a concealed weapon in a vehicle] with you because should he have been carrying a gun in the car the way he was? No. I’m not saying Mr. Embry is perfect. I’m not saying he did everything the way he should have. But what I am telling

you is he was acting in self-defense. *And self-defense is a complete defense to Counts 1, 2, 3, and 4.*” (Italics added.)

Following counsel’s argument, the court, in light of the plain language of section 195, subdivision (2),⁶ advised the jury:

“Ladies and gentlemen, at this point the attorneys have both had the opportunity to discuss the facts with you. I did want to point something out. An excusable homicide, an accident in the heat of passion, does not apply where the defendant used a dangerous weapon. So excusable homicide accident in the heat of passion does not apply where the defendant used a dangerous weapon. Here a handgun was used; therefore, excusable homicide accident in the heat of passion does not apply.”

C. Analysis

Embry’s claim of ineffective assistance of counsel concerns defenses set forth in section 195, subdivisions (1) and (2). Section 195 provides:

“Homicide is excusable in the following cases:

1. When committed by accident and misfortune, or in doing any other lawful act by lawful means, with usual and ordinary caution, and without any unlawful intent.
2. When committed by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner.”

Embry argues defense counsel’s performance was deficient to the extent she relied on the theory of accidental homicide in the heat of passion, and Embry was prejudiced thereby. However, the record is clear that counsel posited a self-defense theory to the jury and did not contend the homicide was excusable as an accidental homicide in the heat of passion.

Defense counsel made a reasonable strategic choice, in light of the facts of the case, to focus on self-defense rather than, or in addition to, accidental homicide in the

⁶ Section 195, subdivision (2), specifically provides that this provision does not apply when “any dangerous weapon [was] used” to commit the homicide in question.

heat of passion or accidental homicide. Specifically, a defense that the homicide was excusable because it was accidental did not appear viable in light of persuasive evidence presented by the prosecution showing the gun had a safety mechanism and to fire the gun, especially in the double-action mode Embry said he had used, he would have had to pull the trigger purposefully and with considerable force.⁷ Similarly, a heat-of-passion-manslaughter defense was undermined by Embry's own testimony to the effect that, at the time of the shooting, he was not overcome with emotion but, rather, was frightened of Robertson and acted to defend himself.⁸ Defense counsel therefore reasonably opted to argue a theory of self-defense, positing Embry took the gun out to scare Robertson, not necessarily knowing it was loaded, and shot Robertson. Given the facts of the case as well as the fact that self-defense would fully exonerate Embry of all the felony charges in the case, counsel's choice of a self-defense trial theory represented a rational tactical decision.

In her closing argument, counsel outlined the law of homicide for the jury and, in that context, briefly mentioned accidental homicide committed in the heat of passion. Counsel specifically said she was not going to spend time discussing the doctrine of accidental homicide in the heat of passion. She focused instead on self-defense as the defense's trial theory.⁹ Given the facts of the case and counsel's reasonable strategy, Embry was not prejudiced by counsel's limited, contextual references to accidental

⁷ Embry testified he did not manually cock the gun's hammer at any point.

⁸ Heat of passion encompasses an objective element—provocation—and a subjective element—passion; both prongs must be affirmatively demonstrated at trial. (*People v. Williams* (1971) 71 Cal.2d 614, 623-624; *People v. Lujan* (2001) 92 Cal.App.4th 1389, 1411-1412.) With respect to the passion prong, the defendant's reason and judgment must *actually* be obscured by intense emotion at the time of the homicidal conduct. (*People v. Lasko* (2000) 23 Cal.4th 101, 108.)

⁹ We disagree with the People's suggestion that the defense theory of the case "could have been viewed" as positing that the homicide in question was an accidental homicide in the heat of passion.

homicide in the heat of passion under section 195, subdivision (2). Since Embry has not shown prejudice, his claim of ineffective assistance of counsel on this basis fails.

Embry further argues his counsel was ineffective because, after the court instructed the jury that accidental homicide in the heat of passion did not apply to this case, counsel should have asked the court to allow her to present a further closing argument to the jury. Specifically, Embry contends counsel should have argued that the homicide was excusable because it was accidental, as set forth in section 195, subdivision (1) (in contrast to § 195, subd. (2)). He also contends counsel should have clarified, for the jury's benefit, the distinction between an accidental homicide in the heat of passion and heat-of-passion manslaughter.

However, as explained above, counsel strategically chose to highlight self-defense as the theory of defense. Along with this choice, counsel could reasonably have opted *not* to posit alternative theories of defense to the jury, for fear of diluting the defense case. (See *People v. Fosselman* (1983) 33 Cal.3d 572, 581 [counsel's tactical decisions lead to reversal on grounds of ineffective assistance "only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for his act or omission"]; see also *People v. Jones* (2003) 29 Cal.4th 1229, 1254 [" 'Courts should not second-guess reasonable, if difficult, tactical decisions in the harsh light of hindsight.' "]; *Doolin, supra*, 18 Cal.4th at p. 421, fn. 22 [the fact a defense strategy turns out to be unsuccessful does not render counsel's representation ineffective].) Nor, as discussed above, was any alternative theory of defense particularly viable, including excusable homicide committed by accident or misfortune or heat-of-passion manslaughter. Thus, Embry cannot show counsel was deficient in failing to highlight alternative theories of defense, such as excusable homicide committed by accident or misfortune or heat-of-passion manslaughter. Indeed, since counsel may have had a tactical reason for acting as she did (and the reason is not reflected in the record), the matter of ineffective assistance of counsel should be addressed in habeas proceedings, where a record of counsel's

reasons can be developed. (*People v. Avena* (1996) 13 Cal.4th 394, 419; *In re Dennis H.* (2001) 88 Cal.App.4th 94, 98 & fn.1; *People v. Plager* (1987) 196 Cal.App.3d 1537, 1543.)

Embry's contention also fails because he cannot show prejudice. More specifically, it is not reasonably probable that, had counsel argued Embry accidentally shot and killed Robertson or highlighted the distinction between accidental homicide in the heat of passion and heat-of-passion manslaughter as part of a voluntary manslaughter theory of defense, the outcome of the proceeding would have been more favorable to Embry. Here, Embry's gun functioned in both single-action and double-action modes. Embry testified he did not manually pull the hammer back at any point, whereby the gun would be operating in the double-action mode. Under these circumstances, considerable force would have to be applied to pull the trigger and fire the gun. In addition, the gun was fired twice. On this record, a theory that Embry accidentally shot and killed Robertson was not viable. A heat-of-passion manslaughter theory was also not particularly viable given that Embry did not testify he acted in the heat of passion; rather he testified he took out the gun because he was frightened of Robertson and needed to defend himself. In any event, the jury was properly instructed on both excusable homicide by accident or misfortune as well as heat of passion manslaughter. Furthermore, had counsel highlighted multiple, alternative theories of defense, given the facts of this case, the resulting lack of a coherent trial theory would not reasonably have advanced the defense case.

Embry has not shown counsel's performance was deficient in failing to request additional closing argument, to highlight alternative defense theories of excusable homicide by accident or misfortune and heat-of-passion manslaughter. He has also failed to show he was prejudiced by counsel's decision in this regard. Thus, Embry's claim of ineffective assistance of counsel cannot succeed.

III. CUMULATIVE ERROR

Embry also argues reversal of the judgment is required because of the cumulative effect of the errors at issue in his foregoing claims. (See *Hill, supra*, 17 Cal.4th at p. 844 [“[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.”]; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349, overruled on other grounds by *People v. Whitmer* (2014) 59 Cal.4th 733 [the success of a claim based on cumulative errors turns on whether “it is reasonably probable the jury would have reached a result more favorable to the defendant in their absence”].) However, in light of our resolution of Embry’s foregoing claims, there is no question of cumulative error. This claim therefore fails.

IV. SENATE BILL NO. 620 (FIREARM ENHANCEMENTS)

Senate Bill No. 620, signed by the Governor on October 11, 2017, and effective January 1, 2018, added the following language to the firearm enhancement provisions in sections 12022.5 and 12022.53:

The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. (§§ 12022.5, subd. (c), 12022.53, subd. (h); Stats. 2017, ch. 682, § 1, 2.)

Senate Bill No. 620 thus granted trial courts new discretion to strike firearm enhancements arising under sections 12022.5 and 12022.53.

Here, the trial court imposed, in connection with the second-degree murder conviction, a then-mandatory firearm enhancement under section 12022.53, subdivision (d), carrying a sentence of 25 years to life in prison. The trial court also imposed, in connection with the assault-with-a-firearm conviction, the *upper* term of 10 years, under the then-mandatory firearm enhancement set forth in section 12022.5, subdivision (a), which provides for an additional term of imprisonment of “3, 4, or 10 years.”

Embry argues the amendments to sections 12022.5 and 12022.53 are retroactively applicable, under *In re Estrada* (1965) 63 Cal.2d 740, 745, to cases pending final judgment (like his case), because these amendments potentially mitigate punishment.¹⁰ (See *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091 [retroactively applying Senate Bill No. 620 to case not yet final when law became effective]; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678-679 [same].) The People concede the amendments are retroactive under *Estrada* and apply to Embry's case.

The People contend, however, that remand for resentencing is not necessary in this instance because the sentencing court's failure to apply the new law was essentially harmless, in view of the court's denial of Embry's *Romero* motion to dismiss his prior strike and the severe sentence it imposed. (*Romero, supra*, 13 Cal.4th 497.)

The People cite *People v. Gutierrez* (1996) 48 Cal.App.4th 1894 (*Gutierrez*) in support of their argument. In *Gutierrez*, the Court of Appeal, relying on comments made by the trial court at the sentencing hearing, declined to remand for resentencing after the courts gained discretion to strike prior strikes under *Romero*. The trial court in *Gutierrez* had exercised its discretion not to strike a different enhancement, *commenting that it did not believe the defendant's sentence should be shortened*. (*Gutierrez, supra*, at p. 1896.) Although *Gutierrez* did not remand for resentencing in light of the trial court's comments, it nonetheless clarified remand was necessary "unless the record show[ed] that the sentencing court *clearly indicated* that it would not, in any event, have exercised its discretion to strike the [enhancement] allegations." (*Ibid.*, italics added.)

People v. McDaniels (2018) 22 Cal.App.5th 420 (*McDaniels*), applied the *Gutierrez* approach to the defendant's request for remand for resentencing under Senate

¹⁰ For purposes of determining the retroactivity of ameliorative amendments to criminal statutes, a judgment is not final until the time for petitioning for a writ of certiorari in the United States Supreme Court has passed. (*People v. Viera* (2005) 35 Cal.4th 264, 306; *People v. Nasalga* (1996) 12 Cal.4th 784, 789, fn. 5.)

Bill No. 620. *McDaniels* remanded the case for resentencing because “the record contain[ed] no clear indication of an intent by the trial court not to strike one or more of the firearm enhancements” in light of the amendments effected by Senate Bill No. 620. (*McDaniels*, *supra*, at pp. 427-428; see *People v. Almanza* (2018) 24 Cal.App.5th 1104 [adopting the *McDaniels* approach and remanding to allow trial court to reconsider the sentence in light of amendments to firearm-enhancement statutes effected by Senate Bill No. 620].)

McDaniels’s approach aligns with a California Supreme Court case, also called *Gutierrez*, i.e., *People v. Gutierrez* (2014) 58 Cal.4th 1354. There, at the time of sentencing, the governing law contained a *presumption* that juvenile defendants found guilty of specific crimes under certain circumstances would be sentenced to LWOP terms. A change in the law, which was held to apply retroactively to cases still pending on direct appeal, dictated that this presumption be removed, thus increasing the scope of the trial court’s sentencing discretion. Our Supreme Court held that, for defendants sentenced under the former law but to whom the new law applied retroactively, “the appropriate remedy is to remand for resentencing unless the record ‘clearly indicate[s]’ that the trial court would have reached the same conclusion ‘even if it had been aware that it had such discretion.’” (*Id.* at p. 1391.) Our Supreme Court emphasized, “ ‘Defendants are entitled to sentencing decisions made in the exercise of the “informed discretion” of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that “informed discretion” than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant’s record.’ ” (*Ibid.*)

We agree with *McDaniels*’s approach. Unless the sentencing court clearly indicated it would not have struck the enhancements in question if it could, determining what it would likely have done had it possessed the new discretion is an inherently speculative enterprise. Here, at the time of sentencing, the firearm enhancements under

sections 12022.5, subdivision (a) and 12022.53, subdivision (d), were mandatory, and the court imposed the firearm enhancements as to counts 1 and 3 without comment (albeit it imposed the upper term with respect to the firearm enhancement imposed in connection with the assault charge in count 3). Given the lack of a clear statement by the court, as well as the new sentencing environment created by the amendments to the applicable firearm-enhancement statutes, we cannot be confident the same sentence would have been imposed had the law been as it is now.¹¹ Accordingly, remand is appropriate.

The People suggest remand is not necessary because the trial court's sentencing choices indicate it is not reasonably likely the court will strike the firearm enhancements on remand. However, this approach has already been rejected by courts in the context of Senate Bill No. 620. For example, *People v. Almanza* (2018) 21 Cal.App.5th 1308 (*Almanza I*), vacated by *People v. Almanza* (2018) 24 Cal.App.5th 1104 (*Almanza II*), held that the amendments in Senate Bill No. 620 applied retroactively but nonetheless declined to remand for resentencing, because the crime was coldblooded, the defendant had an extensive criminal history, and the trial court chose to make sentences for two counts run consecutively, a choice it would not have made had it been inclined to be lenient. *Almanza I* concluded that, in light of these factors, there was no reasonable probability the trial court would have struck the defendant's firearm enhancement even had it possessed discretion to do so. However, the *Almanza I* opinion was subsequently withdrawn on rehearing and a new opinion issued. (*Almanza II, supra*, 24 Cal.App.5th 1104.) *Almanza II* rejected the "reasonable probability" standard advanced by *Almanza I* and instead adopted the *McDaniels* approach. *Almanza II* remanded the case to allow the trial court to reconsider its sentence in light of the amended firearm enhancement statute.

¹¹ The court noted the case was too "egregious" to warrant a grant of felony probation. However, that comment was made in the context of assessing whether the defendant was a suitable candidate for a probationary sentence and does not assist us with the issue at hand.

(*Almanza II*, *supra*, at pp. 1110-1111 [“[S]peculation about what a trial court might do on remand is not ‘clearly indicated’ by considering only the original sentence.”].) Here, the People attempt to blur the distinction between the “clearly indicated” standard approved in *McDaniels* and the “reasonable probability” standard rejected by *Almanza II*, but the argument is unavailing. We will follow *McDaniels* and *Almanza II*.

On remand, the trial court will have the option to exercise its discretion to strike the firearm enhancement imposed under section 12022.53, in connection with the murder conviction. Similarly, with regard to the assault-with-a-firearm conviction, the court will have the option to decline to impose enhanced penalties under section 12022.5, or to select a lower term than the term it previously imposed.

V. SENATE BILL NO. 1393 (PRIOR-SERIOUS-FELONY ENHANCEMENTS)

Senate Bill No. 1393, which was signed by the Governor on September 30, 2018 and became effective on January 1, 2019, gives “courts discretion to dismiss or strike a prior serious felony conviction for sentencing purposes.” (*People v. Garcia* (2018) 28 Cal.App.5th 961, 965, 971.)

Here, the trial court found true the section 667, subdivision (a) prior serious felony convictions alleged in the information and imposed the statutorily-mandated consecutive five-year sentences when it sentenced Embry on March 29, 2017. (See *People v. Garcia*, *supra*, 28 Cal.App.5th at p. 971.) At that time, imposition of the five-year sentence was mandatory. Section 667, subdivision (a) required imposition of prior serious felony enhancements in compliance with section 1385, subdivision (b), which in turn expressly precluded courts from striking prior serious felony convictions for sentencing purposes. (See *People v. Valencia* (1989) 207 Cal.App.3d. 1042, 1045-1047.) Senate Bill No. 1393 amended both section 667, subdivision (a) and section 1385, subdivision (b) to delete restrictions on the court’s sentencing discretion to strike prior serious felony convictions for sentencing purposes. (See Stats. 2018, ch. 1013, §§ 1, 2.)

The parties agree that the amendments effected by Senate Bill No. 1393 are retroactively applicable to Embry's case, which is pending final judgment. (See *Estrada*, *supra*, 63 Cal.2d 740; *People v. Garcia*, *supra*, 28 Cal.App.5th at p. 973.) The People contend, however, that remand is nonetheless not necessary as the trial court would likely impose the same sentence again, on the basis of Embry's criminal history. As discussed below, the court denied Embry's *Romero* motion in light of his criminal history, but the question before the court at that juncture was specifically whether Embry should be sentenced as a *second-strike* offender.

Given that we must apply the "clearly indicated" standard discussed above and the fact the court imposed the then-mandatory enhancements under section 667, subdivision (a), without comment, we will remand to give the trial court the opportunity to exercise its newly-conferred discretion under section 667, subdivision (a) and section 1385, subdivision (b), as amended by Senate Bill No. 1393.¹²

VI. TRIAL COURT'S DENIAL OF EMBRY'S *ROMERO* MOTION

Embry also challenges the trial court's denial of his *Romero* motion. Embry filed a *Romero* motion, requesting the court to strike his sole and highly remote serious felony conviction under section 1385. (See *Romero*, *supra*, 13 Cal.4th 497.) The trial court denied the motion and Embry now challenges that ruling. He argues the trial court's "failure to strike [his] 30-year old prior serious felony conviction," alleged as a strike conviction, "constituted an abuse of discretion."

Romero confirmed that, under the Three Strikes scheme, the trial court retains the discretion to dismiss or strike one or more of the defendant's prior serious or violent felony convictions, alleged as a recidivist enhancement under the scheme. (*Romero*, *supra*, 13 Cal.4th at pp. 504, 529-530.) More specifically, *Romero* clarified the court

¹² We express no opinion as to how the trial court should exercise its discretion upon remand.

may strike prior “strike” convictions pursuant to section 1385, “in furtherance of justice.” (§ 1385; *Romero*, *supra*, at p. 531.)

A request for such relief is commonly referred to as a *Romero* motion. (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*).) The trial court’s ruling on a *Romero* motion is reviewed for abuse of discretion. (*Carmony*, at p. 375.) Our Supreme Court has noted this standard of review is deferential but not “empty.” (*People v. Williams* (1998) 17 Cal.4th 148, 162 (*Williams*).) “Although variously phrased in various decisions [citation], it asks in substance whether the ruling in question ‘falls outside the bounds of reason’ under the applicable law and the relevant facts.” (*Ibid.*) Indeed, “ ‘all exercises of legal discretion must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.’ ” (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 (*Alvarez*).)

Williams addressed the scope of the inquiry to be undertaken by the trial court in ruling on a *Romero* motion. The touchstone of the *Romero* determination is whether “the defendant may be deemed outside the [Three Strikes] scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*Williams*, *supra*, 17 Cal.4th at p. 161.) *Williams* clarified that making this assessment requires “balanc[ing]” the defendant’s “constitutional rights,” including “the guarantees against disproportionate punishment of the Eighth Amendment to the United States Constitution and article 1, section 17 of the California Constitution” on the one hand, and “society’s legitimate interests,” including “the fair prosecution of properly charged crimes,” on the other hand. (*Williams*, *supra*, at pp. 160-161.) In striking the requisite balance, “preponderant weight must be accorded to factors intrinsic to the [Three Strikes] scheme, such as the nature and circumstances of the defendant’s present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects.” (*Id.* at p. 161; see *Romero*, *supra*, 13 Cal.4th at p. 531 [in exercising its discretion as to whether to strike a prior

strike conviction, the court must consider the “defendant’s background,” “the nature of his present offenses,” and other “individualized considerations”].) “‘[W]hen the balance falls clearly in favor of the defendant, a trial court not only may *but should* exercise the powers granted to him by the Legislature and grant a dismissal in the interests of justice.’ ” (*Carmony, supra*, 33 Cal.4th at p. 375.)

People v. Cluff (2001) 87 Cal.App.4th 991 (*Cluff*), held the trial court there had “abused its discretion when it denied [the defendant’s] *Romero* motion.” (*Cluff, supra*, at p. 1004.) *Cluff* observed that, while the court “must be mindful of the sentencing scheme within which it exercises its authority,” it must also “perform its obligation to tailor a given sentence to suit the individual defendant.” (*Ibid.*) Thus, a *Romero* determination requires an “*individualized*” assessment based on “the particular aspects of the current offenses for which the defendant has been convicted” as well as “the defendant’s own history and personal circumstances.” (*Ibid.*, italics added.)

Here, the circumstances surrounding the underlying strike offense itself are unusual. First, the strike offense, battery with injury, is a wobbler offense; in other words, it is an offense that is not automatically and consistently a strike offense. (§ 243, subd. (d).) Next, Embry’s probation report explains Embry had “struck [a] female victim on [her] ear” and defense counsel represented to the trial court that the injuries sustained by the victim were “minimal”; “no stitches” were necessary and there was “no loss of consciousness.” The prosecutor did not contradict defense counsel’s characterization of the facts. Furthermore, Embry was convicted of the offense in 1986, approximately three decades before the instant crime.¹³ Indeed, his conviction occurred eight years before the

¹³ While a Three Strikes sentence is, as a general matter, imposed regardless of the “length of time between the prior serious and/or violent felony conviction and the current felony conviction,” the remoteness of the prior strike conviction is nonetheless relevant for purposes of determining, *in the first instance*, whether to dismiss the strike conviction under section 1385. (§§ 667, subd. (c)(3), 1170.12, subd. (a)(3); *People v. Bishop* (1997)

Three Strikes law was even enacted.¹⁴ (§§ 242/243, subd. (d).) More specifically, Embry pleaded guilty to the felony version of the offense in exchange for a probationary sentence.

Significantly, Marketa Williams, the victim of the battery offense, remained in contact with Embry, off and on, over decades. Williams submitted a letter to the court in support of leniency for Embry with regard to his sentencing in this matter. Williams indicated the battery occurred during a difficult patch for her and Embry, when both were addicted to drugs; she wrote that subsequently they both improved their circumstances. (See *People v. Garcia* (1999) 20 Cal.4th 490, 503 (*Garcia*) [fact that defendant’s “crimes were related to drug addiction,” along with other factors, justified departure from Three Strikes sentencing].) Williams also personally attended Embry’s sentencing hearing. Defense counsel pointed out to the court that Williams was present to support leniency for Embry and to confirm for the court she did not object to the court striking Embry’s 1986 battery conviction under *Romero*. The 1986 battery conviction was Embry’s only serious felony or strike conviction. As for the rest of Embry’s criminal history, his prior offenses were all misdemeanor offenses (the offenses either were misdemeanors at the time he committed them or are now so classified), with the exception of two highly remote drug-related felonies from 1976 and 1989, respectively.

Williams clarified that “the court in question *must* consider whether, in light of the nature and circumstances of his present felonies *and* prior serious and/or violent felony

56 Cal.App.4th 1245, 1251 [trial court properly considered remoteness of prior strike offenses, among other factors, in dismissing the strikes under § 1385].)

¹⁴ “What is commonly referred to as the Three Strikes law ‘consists of two, nearly identical statutory schemes’: the first enacted by the Legislature in March 1994 (Pen. Code, former § 667, subds. (b)-(i)), and the second enacted by ballot initiative in November 1994 (Pen. Code, former § 1170.12, added by Prop. 184, as approved by voters, Gen. Elec. (Nov. 8, 1994)).” (*People v. Valencia* (2017) 3 Cal.5th 347, 378, fn. 1 (conc. opn. of Kruger, J.), quoting *Romero, supra*, 13 Cal.4th at pp. 504-505.)

convictions, *and* the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole *or in part*.”¹⁵ (*Williams*, *supra*, 17 Cal.4th at p. 161, italics added.) Here, the court acknowledged its duty to apply the *Williams* standard.¹⁶ The court concluded, “it does not appear to this Court that the defendant falls outside the schemed spirit, so the motion will be denied.” Although the court could well have decided differently based on the unusual facts of this case, we cannot say that the court abused its discretion in denying the motion to strike the 1986 conviction.

¹⁵ In assessing a defendant’s “prospects” in terms of the commission of future crimes, the sentence imposed by the trial court is itself relevant, since the defendant is presumably unlikely to reoffend while imprisoned. In this context, our Supreme Court has observed: “[A] defendant’s sentence is also a relevant consideration when deciding whether to strike a prior conviction allegation; in fact, it is the overarching consideration because the underlying purpose of striking prior conviction allegations is the avoidance of unjust sentences.” (*Garcia*, *supra*, 20 Cal.4th at p. 500.)

¹⁶ The court stated: “When I’m reviewing whether or not to strike a strike, I look at the factors from [*People v. Williams*], a 1998 case ... And essentially I’m to look at in light of the nature and circumstances of the present felonies and/or serious or violent prior felonies, the particulars of his background, character and prospects, [whether] the defendant may be deemed outside the schemed spirit in whole or in part.” (Italics added.)

DISPOSITION

The sentence is vacated and the case remanded to the trial court for resentencing pursuant to (1) sections 12022.5, subdivision (c) and 12022.53, subdivision (h), as amended by Senate Bill No. 620 (Stats. 2017, ch. 682, § 1, 2); and (2) sections 667, subdivision (a) and 1385, subdivision (b), as amended by Senate Bill No. 1393 (Stats. 2018, ch. 1013, §§ 1, 2). The judgment is otherwise affirmed.

SNAUFFER, J.

WE CONCUR:

LEVY, Acting P.J.

POOCHIGIAN, J.